UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	§	
	§	
DELEK REFINING, LTD.	§	
	§	
Employer,	§	
	§	
And	§	Case No. 16-RC-149865
	§	
UNITED STEEL, PAPER AND FORES-TRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, AND ITS LOCAL 202	§	
	§	
Petitioner.	§	

REQUEST FOR REVIEW AND STAY OF THE REGIONAL DIRECTOR'S DECISION AND ORDER OF ELECTION

Delek Refining, Ltd. (hereinafter "Delek"), by through undersigned counsel, respectfully files this Request for Review of the Regional Director's Decision and Order of Election in the above-numbered cause. Delek submits that the Regional Director's factual findings and legal conclusions are fundamentally flawed and unsupported by the preponderance of testimonial and documentary evidence of record. Of particular note, the Regional Director effectively ignored the factual and legal significance of a 30-year span of the parties' bargaining history in concluding that the petitioned-for unit was appropriate and shared a community of interest with a wildly dissimilar existing bargaining unit. Accordingly, the Request of Review should be granted and the underlying Decision and Order of Election should be stayed pending the Board's review, as contemplated by 29 C.F.R. § 102.67(h).

Respectfully submitted,

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I. INTRODUCTION

A. Statement of the Case

The employer in this case, Delek Refining, Ltd. (hereinafter "Delek" or "the Company"), operates a petroleum refinery in Tyler, Texas. The production and maintenance employees at Delek's refinery are represented for purposes of collective bargaining by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, and its Local 202 (hereinafter "the Union"). This case arises out of a Petition that the Union filed with Region 16 of the National Labor Relations Board seeking an *Armour-Globe* election with respect to four (4) "Storeroom Attendants" working in Delek's refinery warehouse.[1] More specifically, the Petition sought an election whereby the Storeroom Attendants might be added to the refinery's existing bargaining unit.

Delek, at all times, opposed the Petition because the existing bargaining unit is populated with only maintenance and operations employees who share no meaningful community of interest with the Storeroom Attendants. Delek likewise opposed the Petition because, for the last 30 years of the parties bargaining relationship, warehouse positions have been excluded from the Tyler bargaining unit despite their having been previously included to some degree. Thus, regardless of whether it is based upon their decades-long, conscious exclusion from the bargaining unit or the absence of any meaningful community of interest, Delek has contended and maintains through this Request for Review that the petitioned-for unit is inappropriate. As

[1] Historically at the Tyler refinery, those employed in the warehouse have been classified and referred to as either a "Warehouseman" or, most recently, "Warehouse Technicians." (See Co. Ex. 2, at p. 44-45; and Co. Ex. 4.) The Petition uses the term "Storeroom Attendant" in referring to the subject employees. That term is a product of the printed manuals relating to a new materials-management program that Delek implemented, approximately two years ago called the RAMS System. (See generally Tr. 38-40, for a description.) At the Hearing Officer's request, the parties agreed to use the term "Storeroom Attendant" for this proceeding, but also agreed that the term was synonymous with "Warehouseman" and "Warehouse Technician." (Tr. 8-9; 25-26.)

such, Delek simultaneously seeks an Order from the Board staying the effect of the Regional Director's DDE.

B. Procedural History

Following the Petition's filing on April 10, 2015, the Regional Director set an evidentiary hearing for April 21, 2015. The hearing was conducted in Tyler, Texas, ultimately requiring two (2) days of testimony, and resulting in a transcribed record of 454 pages – including two Board exhibits, one Petitioner exhibit, and six Employer exhibits. Both parties filed post-hearing briefs on April 29, 2015. The Regional Director issued and mailed the Decision and Direction of Election (hereinafter "DDE") on May 15, 2015. This timely Request for Review – and accompanying Request for a Stay pursuant to 29 C.F.R. 102.67(h) – follows.

I. STANDARD OF REVIEW

The Board will grant review of a Regional Director's decision where compelling reasons exist. *NLRB Rules and Regulations Series 8*, Sec. 102.67(c). Two of the four listed compelling reasons are: (1) a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from officially reported Board precedent; and (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party. 29 C.F.R. § 102.67(d) (2015). Each of these reasons compel a decision granting Delek's Request for Review in the instant case – all as more fully set forth and supported below.

II. FACTUAL BACKGROUND

Delek's petroleum refinery in Tyler, Texas processes crude oil into products such as gasoline, diesel fuel, jet fuel, and propane gas, for commercial and consumer uses. (Tr. 67.)[2]

[2] Citations to "Tr. ___" refer to specific pages of the transcribed hearing record. Citations to "Co. Ex. ___," "Un.

The refinery has a workforce of approximately 130 hourly employees who are responsible for operating and optimizing the process machines that transform the crude oil into the referenced refined products. These employees are commonly referred to as Production employees. (Tr. 29.)

Delek also employs approximately 32 maintenance technicians, including welders, pipe fitters, boilermakers, general maintenance hands, as well as electronic and instrumentation technicians. Collectively, these employees are commonly referred to as Maintenance employees.

The refinery's Production and Maintenance employees are represented by the Union for purposes of collective bargaining, and have been since 1951. The parties' current collective bargaining agreement (hereinafter "CBA") still carries a reference to what was apparently the original certification through National Labor Relations Board Case No. 16-RC-678. (Co. Ex. 1, Art. 1, at p.1.)

Up until 1985, a "Warehouseman" was included in the bargaining unit, as evidenced by a classification and wage rate for that position being printed in the parties' CBA covering years 1983 through 1985. (Co. Ex. 2, at p. 44-45.) The recognition clause embodied in the CBA covering those years, and presumably prior years, provides as follows:

> La Gloria Oil and Gas Company, herein referred to as the 'Company,' recognizes Oil, Chemical, and Atomic Workers International Union and its Local 4-202, herein referred to as the 'Union,' as the sole and exclusive agen[t] for collective bargaining purposes with respect to wages, hours of operation, and other conditions of employment for all maintenance, production, and operating employees, as certified by the National Labor Relations Board in Case No. 16-RC-678, employed at the Company's Tyler, Texas refinery excluding supervisory, technical, clerical, safety, plant protection and professional Employees.

(See Tr. 18-19.)[3]

Ex. ___," and "Jt. Ex. ___" refer to Company exhibits, Union exhibits, and Joint exhibits, respectively, as introduced and accepted into the record during the hearing.

[3] La Gloria Oil and Gas Company was the trade name under which Delek's immediate predecessor in interest operated the Tyler refinery. (Tr. 169-70.) The parties stipulated that the employer and union referenced in the

Beginning with the agreement covering years 1985 through 1987, however, the classification for "Warehouseman" has been absent from the parties' collective bargaining agreement. (Co. Ex. 3, at pp. 8-9.) The recognition clause of the parties' CBA covering those years provides as follows:

> La Gloria Oil and Gas Company, herein referred to as 'Company,' recognizes Oil, Chemical, and Atomic Workers International Union and its Local 4-202, herein referred to collectively as the 'Union,' as the exclusive bargaining agen[t] with respect to wages, hours, and other terms and conditions of employment for all maintenance, production, and operating employees, as certified by the National Labor Relations Board in Case No. 16-RC-678, employed at the Company's Tyler, Texas refinery excluding supervisory, technical, clerical, safety, plant protection, and professional Employees.

(Tr. 22.) This recognition language is similar but not identical to the recognition language in the parties immediately prior CBA, covering 1983 through 1985.

Thus, for the most recent 30 years of the parties' bargaining relationship, no "Warehouseman" or other Delek employee working in the refinery's warehouse has been included in the bargaining unit. (Tr. 20-24.) Notably, those 30 years span approximately 10 different three-year collective bargaining agreements as well as each those agreement's associated negotiation sessions. For varying periods of time covered by those 10 collective bargaining agreements, the Tyler warehouse was staffed by independent contractors: first by the Wilson Group until approximately 2010, and then by McJunkin Red Man, until late 2011. (Tr. 178-79; 195-96.)

It was not until the negotiations over the most recent CBA, ratified on or about April 7, 2015, that the Union requested for the first time in the last 30 years that the refinery's four (4) Storeroom Attendants be returned to the bargaining unit. Delek rejected the proposal based upon

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referenced recognition clause are, by succession, the named parties to the instant case.

the objective absence of any viable community of interest between the Production and Maintenance employees and the Storeroom Attendants. (Tr. 23-24.) No subsequent or modified proposals were made. (Id.)

The recognition clause in the parties' currently applicable CBA provides as follows:

> Delek Refining, Ltd. (hereinafter referred to as the "Company") recognizes the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, and its Local 202 (hereinafter referred to as "the Union") as the exclusive Bargaining Agent with respect to wages, hours and other terms and conditions of employment for all regular maintenance, production, and Operating Employees as well as Specific hourly Safety Employees, as certified by the National Labor Relations Board in Case No. 16-RC-678, employed at the Company's Tyler, Texas refinery excluding supervisory, technical, clerical, safety, plant protection and security, marketing terminal, loading rack and its Employees, and professional Employees.

(Co. Ex. 1, Art. 1, at p. 1.) The current recognition clause has clearly evolved in certain respects during the last 30 years, evidencing the parties' active bargaining during that time. Thus, it is significant that warehouse positions have remained excluded from the bargaining unit and that the Union has accepted their exclusion – not having mounted any efforts to the contrary – until only very recently. (Tr. 23-24.)

Storeroom Attendants are classified as salaried, non-exempt Professional employees. (Tr. 40-41; see also Co. Ex. 4.) However, their primary duties are clerical in nature. Under the direct supervision of Delek's Warehouse Supervisor, Thomas Lynn, Storeroom Attendants are responsible for accepting, cataloguing, and storing all materials that the refinery purchases for use in furtherance of all aspects of its business. (Tr. 43-45.) Thus, everything from paper clips and toilet paper to pipes, mechanical parts, and machinery arrives through the Tyler warehouse. While all purchasing for the refinery is handled through a separate Procurement Department, once the items arrive for delivery, the Storeroom Attendant's job begins.

Both Procurement and the Warehouse (or "Storeroom") are separate divisions of the refinery's Administration Department. (Tr. 150-51.) Other divisions in the Administration Department include Accounting, Information Technology, Security, and Training. (Tr. 28-29.) David Anderson is the Administration Department's Manager, and all of its divisions have their own front-line supervisors who report to him. Mr. Anderson, in turn, reports to the Refinery Manager, Louis LaBella, who is the refinery's highest-ranking official.

Unlike the Storeroom Attendants, the refinery's bargaining-unit Maintenance employees are organized into an entirely separate department – the Maintenance Department. That department is managed by Kane Turner, the Maintenance Manager, who reports directly to the Refinery Manager, Mr. LaBella. Thus, the Maintenance employees share no common supervision with the Storeroom Attendants, other than at the very highest level.

Like the Maintenance employees, the refinery's bargaining-unit Production employees are organized into their own, separate department and supervised by managers who have no responsibility whatsoever for the warehouse or the Storeroom Attendants. (Tr. 64-65.) Production employees are members of the Operations Department, managed by Jerry Brumley. As a department manager, Mr. Brumley, like Messrs. Anderson and Turner, reports directly to Mr. LaBella as Refinery Manager. (Tr. 65.)

All together, the Administration, Maintenance, and Operations, are three of a total of nine departments that report to Mr. LaBella, again, each with its own separate manager. (Id.) In all, those departments are: Administration, Capital Projects, Environmental, Maintenance, Operations, Planning and Economics, Safety / PSM, Technical Services, and Transportation. (Id.) Each department is responsible for entirely separate functions and makes entirely separate contributions to the refinery's operations. As both parties' witnesses testified during the hearing,

each department's employees contribute equally valuable pieces – or "services" – to the refinery's overall mission. (Tr. 330-31; 408.)

That said, the work that the Storeroom Attendants perform toward that mission, as Administration Department employees, could not be more different that the work performed by the bargaining-unit Production and Maintenance employees. Storeroom Attendants receive incoming warehouse inventory, inspect it for overt defects and/or shipping damage, catalogue the inventory and scan it into the Warehouse's inventory-management system, and ensure that the inventory is placed in its proper / designated location within the Warehouse – or the adjacent "tote yard" – so that it can be easily located when needed.[4]

Aside from their duties with respect to incoming Warehouse inventory, the Storeroom Attendants are responsible for ongoing accountability for those inventory items. This includes regular "cycle counting" and periodic full inventory of the Warehouse items – valued on any given day at approximately $8 million. (Tr. 33-34, 37, 43, 48.)

As those items are requested by other refinery departments, the Storeroom Attendants are responsible for gathering the ordered items from the Warehouse shelves and either delivering the items to the department that ordered them or dispensing the items directly to other refinery employees who come personally to the Warehouse counter to collect them. (Tr. 81-82.) In either event, an employee from the department receiving the materials from the Warehouse signs a "pick ticket," which identifies the items ordered confirms receipt of the items by the signatory employee's department. (Tr. 262.)

[4] The "tote-yard" is adjacent to the Warehouse and is the place where larger, palletized "chemical totes" are stored utilizing a forklift. Totes are typically large containers containing liquid chemicals used in the refining process. The size and composition of many of these chemical totes moved the refinery to store them together in one designated area.

The Storeroom Attendants' primary duties require the use of standard office software and computers. (Co. Ex. 4, 5.) It also involves the use of bar-code scanners, linked into those computers. (Tr. 274-75.) While not all of the Storeroom Attendants' duties depend upon their use of computers and scanners, the refinery's adoption and implementation of the RAMS system – beginning approximately two years ago – carries with it a significant goal of continuing to move the Storeroom Attendants' function more and more toward a fully computerized and automated work flow.[5] Although Storeroom Attendants necessarily perform some measure of physical labor in storing, moving, and delivering inventory, their primary responsibilities – particularly under the increasingly evolving RAMS protocol – are "desk" type jobs requiring the use of computer equipment and related technology, much like the other Administrative Department positions such as the refinery's Accountants, Procurement professionals, and Information Technology professionals. (Tr. 28-29.) Current Storeroom Attendant, Micah Sharman, testified that Storeroom Attendants spend 80-90% of their time working inside the warehouse, with the remaining 10-20% of their time spent delivering items to all departments that serve the refinery. (Tr. 70; 310.) Storeroom Attendants' regular hours are as follows: two Storeroom attendants on duty from 7:00 a.m. to 4:00 p.m., with the other two working from 10:00 a.m. to 7:00 p.m., Monday through Friday. (Tr. 62-63.)

Unlike the much more administrative / clerical functions for which the Storeroom Attendants are responsible, the bargaining-unit Production and Maintenance employees work inside the refinery's processing areas and are responsible for maintaining, operating, and repairing the actual process equipment that the refinery depends upon to produce the petroleum products that it is in the business of selling. On the maintenance side, the Union's Local

[5] A fuller explanation of the RAMS system can be found at Tr. 37-39; 286-87.

President, Fred Marshall, testified that he – as a bargaining-unit Maintenance employee – spends approximately 90% of his working time out in the refinery's process units. (Tr. 422.) This is the opposite of how the Storeroom Attendant's spend their time. (Tr. 70.) Maintenance employees' regular hours of work are 7:00 a.m. to 3:30 p.m., Monday through Friday.

As for the Production employees, they are responsible for personally operating the process equipment and, thus, spend nearly all of their average work day in the process units for which they are responsible. David Anderson, while currently the refinery's Administration Department Manager with responsibility over the Storeroom Attendants, previously spent four years as Delek's Operations Manager at the Tyler refinery, after having personally served as an operations engineer, operations crew lead, and operations supervisor for approximately six years. (Tr. 29.) That role provided him personal experience in operations brought Mr. Anderson intimate knowledge of all production and operations functions over which he had full departmental responsibility as Operations Manager. His hands-on and managerial experience with both operations and the warehouse gives him a unique perspective that no other witness in this case provided vis-à-vis Production employees and the Storeroom Attendants. (Tr. 31.)

Mr. Anderson testified that Production employees are responsible for the day-to-day operations of the refinery, "the 24/7 operation to refine the oil," monitoring and meeting final technical specifications for the products that the refinery produces, and ensuring the refinery is producing its products in keeping with environmental and safety regulations. (Tr. 29.) These jobs cannot be done anywhere but out in the refinery itself – taking measure of the "sights and sounds," as Mr. Anderson put it, of the refinery's process units. (Tr. 65-66.) Production employees work 12-hour shifts, on a rotating DuPont schedule, in fulfilling these responsibilities. (Tr. 148-49.)

Even the most junior, entry-level Production employee, after completing initial Fundamentals of Refining and specific process-unit training, is responsible for making rounds to inspect the vessels and process machines in the unit within which he or she is working, ensuring proper oil levels and quality of oil and other fluids, and ensuring that the process machines themselves are operating within acceptable parameters. (Tr. 65-66.) They must also check the units' firing furnaces, to ensure that flame patterns are correct and not impinged. Finally, Productions/ Operations employees may be called upon, by higher-level, fellow operators, to trouble-shoot problems detected within the units – for example, to inspect a suspect pump and possibly arrange for its replacement. (Tr. 66.) Regardless, the great bulk of Production/Operations employees' job duties are done outside, in the process-unit areas to which they are assigned. (Id.)

In addition to the foregoing differences, pay and benefits also differ in significant ways. Production and Maintenance employees are paid hourly while Storeroom Attendants are salaried professional employees, although not exempt. (Co. Ex. 4; Tr. 40-41.) Broken-down into hourly rates, Production and Maintenance employees earn considerably more than the Storeroom Attendants – starting at approximately $26.00 per hour for the bargaining unit, but only $16.00 for the Storeroom. (Co. Ex. 1, Art. 17, at p. 20; see also Co. Ex. 4.) However, while their hourly pay is less, the Storeroom Attendants are eligible for the Company's annual cash bonus, as well as an annual grant of stock options. The bargaining-unit Production and Maintenance employees are not eligible for either the cash bonus or the stock options annual benefits. (Tr. 160-61.)

In sum, the facts of record expose many substantive and legally significant differences between the current bargaining-unit's Production and Maintenance employees and the Storeroom Attendants. The testimonial and documentary evidence of record confirms that those differences,

when tested against the community-of-interest factors, factually and legally preclude a finding that the petitioned-for unit is appropriate. The Regional Director's findings and DDE to the contrary warrant the Board's review.

III. LAW AND ARGUMENT

The Regional Director's DDE raises a substantial question of law and/or policy by dismissing the stand-alone significance of a 30-year period in the parties' bargaining history without credible factual support and without any legal support – in the form of officially reported Board precedent or otherwise. Further, in analyzing several of the community-of-interest factors, the Regional Director's decision – which contains no supporting citations to the record and only superficial treatment of even the most critical factual issues – ignores plain, credible, and unimpeached record evidence that objectively compels contrary factual findings. Thus, it is difficult to read the decision as anything other than an effort to avoid inconvenient evidence in order to find that the petitioned-for bargaining unit is appropriate and shares a sufficient community of interest to warrant the directed election. Left unaddressed by Board review, the Regional Director's decision will result in a forced and an inappropriate bargaining unit with members who do not share the requisite community of interests – all of which necessarily threatens the likelihood of success of any resulting bargaining and, indeed, its underlying labor policy.[6] The Request for Review should be granted, and the effects of the DDE stayed pending same.

[6] While the text of this Request for Review is limited to addressing the DDE's more significant errors, in the interest of brevity and contemplating fuller briefing upon review, Delek expressly reiterates, retains for all purposes of challenging the appropriateness of the petitioned-for unit, and does not in any way waive each of the arguments set forth in its post-hearing brief, as timely filed with Region 16 on or about April 29, 2015. To those ends, Delek respectfully incorporates those arguments herein by this reference.

A. The Regional Director's Decision Inappropriately Dismisses the Legal Significance of a 30-Year Span of the Parties' Bargaining History.

The Regional Director dedicated only seven lines of explanation to finding that 30 years of the parties' bargaining history was factually and legally irrelevant to whether the unit petitioned-for in this case was appropriate. (DDE, at pp. 11-12.) While convenient, such treatment is arbitrary and contrary to the record evidence – especially given that the Regional Director does not rely upon any officially reported Board precedent in support of this important factual finding.

The record clearly demonstrates that a "warehouseman" classification and related wage rate was included in the parties' labor agreements from the current bargaining unit's original certification in 1951 through 1984. (Co. Ex. 2, at p. 44-45.) Beginning in 1985, however, and continuing through the present, no warehouse positions – including the Storeroom Attendants at issue in this case – have ever again been included in the bargaining unit. Citing no legal authority, the DDE simply finds that the bargaining period from 1985 through 2011 was irrelevant because Delek used contract labor to operate the warehouse (i.e., in the Storeroom Attendant position) during that time – reasoning that contractors are not the same as non-bargaining-unit personnel; so only the years from 2011 through 2014 are relevant, according to the decision. (DDE, at p. 12.)

Delek takes issue with the Regional Director's decision and reasoning on this point. Nothing changes the fact that the warehouse position was consciously removed from the bargaining unit and never again the subject of bargaining until the most recent negotiations. Stated differently, the Union operated within the refinery without any stated interest in the Storeroom Attendant position for 30 years after agreeing to exclude it from the bargaining unit, at very least waiving by inaction any claim that those positions were appropriately includable in the

existing bargaining unit. That bargaining history is not only longstanding but, contrary to the Regional Director's finding, it is unique and both factually and legally significant to the issue of whether the petitioned-for unit is now somehow appropriate as between these same parties. This important and unique segment of the parties' bargaining relationship should not have been so caprisoulsy dismissed as irrelevant. The Board's review of that decision is warranted because (i) ignoring its determinative significance prejudicially affects Delek's right to the benefit of those 30 years of bargaining history regarding the warehouse positions; and (ii) its significance embodies a substantial question of law and/or policy in the absence of officially reported Board precedent. 29 U.S.C. § 102.67(d)(1).

B. The Regional Director's Factual Findings on Multiple Community-of-Interest Elements Ignore Abundant, Unimpeached Record Evidence; Substantial Factual Determinations Are Clearly Erroneous.

The Regional Director's factual findings seize upon and assign unwarranted significance to the few superficial similarities between the Storeroom Attendants and current bargaining-unit employees. Doing so ignores the factual record of undisputed evidence establishing the *substantive* dissimilarity between the Storeroom Attendants and current bargaining-unit employees. What is more, many of the factual findings are either incomplete or patently belied by record evidence. Below, Delek examines the more glaring examples of the DDE's selective, incomplete, and/or unsupported factual conclusions that warrant the Board's review and action to reverse their undue prejudicial effect.[7]

[7] While Delek highlights the findings enumerated below for purposes of this Request for Review, it retains and does not waive its right to challenge each of the Regional Director's factual findings and conclusions, in the event that review is granted and more complete briefing is permitted. *See supra* note 6.

1. The Storeroom Attendants and Current Bargaining-Unit Employees Do Not Perform Similar Work; the Regional Director's Premise and Conclusion on This Point is Not Supported By a Preponderance of the Record Evidence.

One of the Regional Director's principal findings was that the petitioned-for unit is appropriate because the Storeroom Attendants and certain current bargaining-unit employees (specifically, the those in the Maintenance Department) perform similar work. (DDE, at p. 9.) This despite the abundant and uncontroverted evidence conclusively differentiating the work that those two groups of employees perform. At bottom, the Regional Director's findings on this point rest upon two vague and superficial similarities culled selectively from the record: that both storeroom attendants and maintenance employees "use forklifts" and spend the majority of their day engaged in "physical work." (Id.)

The only Storeroom Attendant who testified, Micah Sharman, admitted that he spends 80% of his typical day working within the confines of the Warehouse and the remaining 20% delivering material throughout the refinery – which includes both the production areas and the administration buildings, meaning that one stop might be delivering parts for a machine and the next stop might be delivering copier paper or bottled water to the Accounting Department. (Tr. 299; 310.) Yes, this is "physical work" but it is not the repair or maintenance of the refinery's process machines and other equipment – which is undisputedly what maintenance employees spend 90% of their time doing, according to the Union's Local President (and current Maintenance employee), Fred Marshall. (Tr. 422.)

Put differently, "physical work" is an improper standard. When comparing the Storeroom Attendants to bargaining-unit Maintenance employees, the substantive kind of "physical work" is what matters; and the kind of physical work that Maintenance employees perform (working in the elements actually fixing and maintaining the refinery's most critical equipment) could not be

more different than the physical work that the Storeroom Attendants perform (intake, inventory, security, and delivery of parts and supplies). The record supports these differences by a preponderance of the evidence, yet the Regional Director ignored that uncontroverted evidence to reach a strained conclusion based upon only superficial bases. This finding is particularly prejudicial because it is so contrary to the established facts and, as such, effectively forces a conclusion that the petitioned-for unit is appropriate. Thus, it is a "substantial factual issue [that] is clearly erroneous on the record and . . . prejudicially affects the rights of a party" – Delek in this case. 29 C.F.R. 102.67(d)(2).[8]

2. There is No Record Evidence of Any Legally Significant "Continuity" or "Integration" Between the Storeroom Attendants and Any Position in the Current Bargaining Unit.

On this issue, the Regional Director wrote: "I find that there is functional integration and significant overlap between the work of the maintenance employees and that of the storeroom attendants . . . . [because] [m]aintenance employees require the assistance of storeroom attendants to perform their work" (DDE, at p. 11.) The undisputed and extensive testimony of record is that every department at the refinery "requires the assistance of the storeroom attendants to perform their work" because the warehouse maintains some 6000 items – everything from printer paper, pencils, and bottled water to gaskets and pump parts. (Tr. 34; 73.) There is simply nothing unique or legally more significant about the bargaining-unit departments' (Operations and Maintenance) reliance on continuity with the warehouse than the reliance by any other

[8] The use of forklifts is a wildly misleading red-herring, as used in the DDE. The fact that Storeroom Attendants and Maintenance employees both use forklifts in performing their respective jobs is irrelevant, unless the petitioned-for unit pertained to equipment operators or the like – where the mere fact that the equipment is used by the employee would be relevant and potentially determinative. Further, the fact that Delek employees who operate forklifts are required to have an operator's certification is also irrelevant because that is an OSHA requirement, not a mandate from the employer. (Tr. 411.) To rely upon the fact that a forklift is "used" clearly ignores *the reason* it is used – i.e., it ignores addressing the similarity of work responsibilities for which the forklift is used. Thus, relying upon "use" alone, as a means of finding that the Storeroom Attendants and Maintenance employees perform "similar work" sufficient to find a community of interest is flawed at best and should not be accepted as determinative.

refinery department. Thus, there is nothing unique or more developed in the integration between the refinery's bargaining-unit employees and the Storeroom Attendants – certainly nothing that could reasonably lead to a finding of "functional integration" or "significant overlap."

Disturbingly, Regional Director's decision makes these critically important findings of "functional integration" and "significant overlap" from a record showing only that: (i) from time to time, Storeroom Attendants may consult bargaining-unit personnel for assistance identifying a particular part; and (ii) that Maintenance employees sometimes *volunteer* to assist the Storeroom Attendants when large items need moving or additional help might be required to unload incoming inventory so that the delivery truck can leave to make room for others. (Tr. 359-60 [Testimony of Mitch Modisett]; 408-09 [Testimony of Fred Marshall].)

Likewise, when he needs an item that has been stored behind other items, such that they need to be moved to access the item he needs, Mr. Modisett testified that he *takes it upon himself* to tidy-up and better organize the area when finished. Mr. Modisett was unequivocal in testifying that he does this "straightening-up" voluntarily, not as any part of assigned work. (Tr. 377-78.)[9] Surely, critical findings such as "functional integration" and "significant overlap" do not follow from these limited, superficial, and temporally sporadic facts, particularly when tested against the record evidence as a whole.

The DDE's factual findings are similarly and demonstrably incorrect on other points that the Regional Director relied upon in making this factual finding. For example, it provides that "the evidence disclosed that maintenance employees request that storeroom attendants be kept available when they [presumably meaning Maintenance employees] are performing significant [maintenance work]." (DDE, at p. 11.) However, the record makes clear the fact that it is

[9] Notably, much of Mr. Modisett's testimony on these points came in response to questions posed by the Hearing Officer directly.

management (not bargaining-unit Maintenance personnel) that makes those scheduling adjustments; and it does so to ensure that inventory needed from the warehouse in support of extraordinary maintenance work (e.g., unit shut-downs and turn-arounds) will be available. (Tr. 157.) When units are intentionally shut-down for maintenance or go down unexpectedly, the Company has every incentive to repair and restart operations as quickly as it safely can. Thus, such repairs are often conducted on an expedited schedule that has Maintenance employees working at times and on days that they normally would not be; so management makes similar but not equal adjustments to the warehouse schedule to help ensure that supplies are available if needed. (Id.) But to rely upon that fact as evidence of "functional integration" and "significant overlap" in the work performed by Storeroom Attendance and Maintenance members of the bargaining unit is both faulty reasoning and factually erroneous.

Similarly, the Regional Director based this finding upon the fact that "maintenance employees communicate frequently with storeroom attendants via the radio to discuss supplies and the needs of jobs." (DDE, at p. 11.) While true, the record reveals – and the Union's witnesses admitted – that *everyone* / all departments at the refinery have the same radio and can communicate with one another using that radio; it is nothing unique to Maintenance employees and Storeroom Attendants, which is how the DDE makes it appear. (Tr. 221.)[10] That finding is contrary to the record and should not be accepted as a basis for finding "functional integration" or "significant overlap." If it is accepted as such, then the Storeroom Attendants have just as

[10] Indeed, the *only* testimony concerning the use of a two-way radio dealt with communications to and/or from the warehouse for the delivery of parts or other items needed. The radio is simply another means of communicating a need for the delivery of warehouse inventory; no different than the RAMS electronic pick-ticket system in use at the refinery. And like the radio, *any* non-probationary employee may request warehouse items by transmitting an electronic pick ticket. Thus, viewed in the proper context of the record as a whole, use of or communications by way of radio between the Storeroom Attendants and Maintenance employees is not credible evidence of any special "integration" or "continuity" between the employees in those two departments. Accordingly, it is insufficient evidence upon which to base a finding that they share any particular community of interest.

much functional integration with the Refinery Manager when his office radios for bottled water as they have with the Maintenance Department. (Tr. 299.) The Storeroom Attendants' job is the same no matter which department or departmental employee(s) radios for an inventory item. To ascribe such special significance to Maintenance employees' radio calls for inventory is unsupported by any competent record evidence; and, in this case, it unfairly leads to a faulty factual conclusion on one of the more important community-of-interest factors, functional integration.

The Regional Director likewise points to the fact that "maintenance employees . . . assist in the inventory process on an annual basis." (DDE, at p. 11.) First, while a full warehouse inventory may be conducted annually, the record evidence in this case establishes only one full inventory – in January of 2015. (Tr. 377.) And, because that particular inventory had to be completed within 48 hours, there was a refinery-wide call for "all hands on deck." (Tr. 360.) The Union's witness who testified on this point, Mr. Modisett, admitted on cross-examination that this was a one-time exercise and that *everyone* in the refinery was asked to help because the inventory count needed to be completed so quickly. (Id.) There was nothing special or unique about the fact that some (not all) Maintenance employees helped with the inventory. Everyone who was available was asked to assist so that the inventory would be completed timely. While not an independently "substantial factual issue," the Regional Director's fact-finding on this issue further reveals a rather disturbing willingness to ascribe factual significance to a particular fact without taking measure of abundant contradictory or contextual evidence – which necessarily results in incomplete and/or erroneous findings of fact.

Lastly on this element of the community-of-interest standard, the Regional Director erroneously wrote "in the absence of storeroom attendants, maintenance employees must retrieve

supplies themselves . . . ." (DDE, at p. 11.) The warehouse is a locked and secure area to which Maintenance personnel do not have access. (Tr. 33.) Employees must "badge" in and out of the warehouse and Maintenance employees' badges do not grant them access to the warehouse. (Tr. 46.) If anyone other than Storeroom Attendants are granted access to the warehouse, they must be escorted. (Tr. 47.) While subtle, this clear factual inconsistency between the record evidence and the DDE's factual findings is yet another reason why review is warranted and why Delek is entitled to a stay and, ultimately, relief from the DDE: it further exposes the superficial and misleading fact-finding that distorts the true record, leading to an objectively improper determination that the petitioned-for unit is appropriate when it clearly is not based upon the record as a whole.

3. The Regional Director's Finding that Storeroom Attendants Can or Have "Transferred" Into Bargaining Unit Positions is Patently False and Entirely Belied By the Record Evidence.

There is No "Interchange" Between Storeroom Attendants and Bargaining Unit Positions. While Mr. Modisett testified that he "bid" for a bargaining-unit position in the Maintenance Department while serving as a Storeroom Attendant does not actually make it so. (Tr. 336-37; 364-65; 439-43.) Axiomatic is the fact that non-bargaining-unit employees (such as the Storeroom Attendants in this case) do not have the contractual right to "bid" into bargaining-unit jobs, as that process is a bargained-for product of the parties' labor agreement. (Tr. 434-35.) As Delek's managers testified at the hearing, Mr. Modisett's improperly submitted bid was ultimately accepted as an "application" only because no member of the bargaining unit bid on the maintenance job in which he was interested. (Tr. 439-43.) The record is uncontroverted on the fact that Mr. Modisett was treated as any outside applicant for an open position would be and his paperwork was processed as such. (Id.) Mr. Modisett admitted that he "had no idea" how his

application was treated administratively. (Tr. 340.) There is simply no credible evidence of record to support the Regional Director's finding that any Storeroom Attendant has *ever* "transferred" from that position into any bargaining-unit position at Delek's Tyler refinery.[11] Thus, there is not now, nor has there ever been, "interchange" between Storeroom Attendants and either segment of the bargaining unit.

The Regional Director's finding to the contrary is highly prejudicial to Delek because it improperly – and without any evidentiary support – erodes and/or inappropriately minimizes the considerable and legally significant differences between the Storeroom Attendant position and those in the existing bargaining unit. The record is replete with testimony contrary to the Regional Director's conclusion and devoid of any credible evidence to support it. What is worse, the DDE makes clear the fact that the Regional Director placed significant weight upon this "fact" in concluding that the petitioned-for unit is appropriate. In relevant part, it states: "[b]ecause there are only four storeroom attendants and they have only worked at the facility for less than four years, the lone transfer is significant." (DDE at p. 10.) Thus, not only is this finding demonstrably contrary to the record evidence but it was given artificial significance by ignoring the entire period of time between 1985 and 2011 – erroneously taking the position that the Storeroom Attendant position has only been an unrepresented classification for four years.

The notion of "interchange" among the petitioned-for unit is significant to the community-of-interest analysis but, in evaluating it in this case, the Regional Director went

[11] Notably, the Hearing Officer personally questioned the Local President, Mr. Marshall, directly on this point and his testimony unequivocally confirmed that Mr. Modisett's "bid" was an anomaly that was not sanctioned by the parties' collective bargaining agreement. (Tr. 334-35.) Coupled with Mr. Anderson's testimony that the "bid" was treated as an outside application because no one else bid on the position or otherwise applied completely forecloses any reasonable avenue for concluding that Mr. Modisett "transferred" from the warehouse into a bargaining-unit position in the Maintenance Department. (Tr. 439-43.) Nevertheless, that was the Regional Director's finding despite this clear record evidence. (DDE, at p. 10.) The willingness to make that finding in the face of such clear record evidence is disturbing.

beyond the limits of fact-finding reasonableness based upon the record evidence. Thus, the prejudice to Delek flowing from that finding warrants both review and appropriate relief.

4. Additional Factual Findings Exhibit the Same Absence of Record Support and Further Suggest That Board Review is Warranted.

The DDE devotes one sentence to the factor of geographic proximity, and summarily finds that it supports the finding of a shared community of interest. (DDE, at p. 10.) While the warehouse and the Maintenance Shop are, in fact, under one expansive "roof," it is also undisputed on the record that the warehouse is isolated under that roof by way of a system of restricted-access doors and security cameras – such that no one from Maintenance or any other department can simply wonder in without access or an escort. (Tr. 33, 46.) Under such circumstances, the analysis of this factor is not as clear-cut as the DDE suggests. Thus, its haste to conclude that simple physical proximity necessarily supports a finding of shared community of interests again exposes what appears to be an effort to rely upon only those facts that tend to support the conclusion reached – despite the presence of other undisputed facts that suggest a contrary conclusion. This, and the more substantive examples above, should give the Board pause and support its decision to grant review.

Similarly, on the issue of the clerical nature of the Storeroom Attendants' duties, the Regional Director is quick to find that they are "more akin to plant clericals," and thus appropriate for inclusion in the current bargaining unit. (DDE, at p. 10.) But the office-clerical tasks that the DDE cites as support for that conclusion are, when fairly reviewed against the record evidence, effectively mirror the duties that all concerned agree Storeroom Attendants perform. The DDE maintains that "office clerical duties are billing, payroll, phone, and mail. (Id.) With the sole exception of payroll, which is handled by another administrative / clerical

department (Accounting), "billing" is tantamount to processing and filling pick-tickets; "phone" is tantamount to answering the radio calls referenced throughout the DDE; and "mail" duty is tantamount to the deliveries that the Storeroom Attendants make throughout the refinery departments. Thus, the Regional Director's fact-finding on the issue of plant versus office clerical similarities is again flawed in that it does not actually analyze the substantive evidence of record in making the multiple factual conclusions referenced above.

These fact-finding infirmities undermine the decision's overall finding that the petitioned-for unit is appropriate and that the Storeroom Attendants share an overwhelming community of interest with any segment of the current bargaining unit. Review should be granted so that all of the record evidence – much of which is uncontroverted – can be properly evaluated against the community-of-interest standard. Doing so fully and fairly will result in a finding that the petitioned-for unit is not appropriate.

IV. CONCLUSION

While only a summary of the more telling examples of faulty and incomplete fact-finding, the foregoing satisfies the legal threshold for Board review. As such, Delek respectfully submits that this Request for Review should be granted and that a coordinate stay should be entered to protect against the effects of the underlying Decision and Direction of Election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2015, a true and correct copy of the foregoing has been electronically filed with the National Labor Relations Board and the Regional Director for Region 16, as contemplated by 29 C.F.R. 102.67(i)(2), and shall this day be served upon the following interested Parties via electronic mail:

Mr. Mike Cross, Organizer
United Steelworkers, et al.
Via Electronic Mail
MCross@usw.org
Representative for Petitioner

/s/ H. Michael Bush